Chang et al v. Virgin Mobile USA LLC et al Doc. 66

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG,	§ § § §	
Plaintiffs,	§	CA No. 3:07-cv-1767
V.	§ §	
VIRGIN MOBILE PTY LTD.,	§ §	
Defendant.	§	

APPENDIX IN SUPPORT OF
DEFENDANT VIRGIN MOBILE (AUSTRALIA) PTY LTD.'S FINAL REPLY TO
PLAINTIFFS' SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS

Description	**Bates**
Declaration of Myall S. Hawkins	APP 1
Excerpts from the deposition of David Cain that was taken on April 23, 2008	APP 2-10

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 29th day of August 2008, I electronically filed the foregoing "Appendix in Support of Defendant Virgin Mobile (Australia) Pty, Ltd.'s Final Reply to Plaintiff's Sur-Reply to Defendant's Motion to Dismiss" with the Clerk of Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means:

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SUSAN CHANG, AS NEXT FRIEND OF ALISON CHANG, A MINOR, AND JUSTIN HO-WEE WONG, Plaintiffs, V. VIRGIN MOBILE PTY, LTD., Defendant.	§ § § § § § § § § § § §	C.A. No. 3-07-CV-01767-ECF

DECLARATION OF MYALL S. HAWKINS IN SUPPORT OF DEFENDANT VIRGIN MOBILE (AUSTRALIA) PTY LTD.'S FINAL REPLY TO PLAINTIFFS' SUR-REPLY TO DEFENDANT'S MOTION TO DISMISS

I, Myall S. Hawkins, declare and state as follows:

1. My name is Myall S. Hawkins. I am a partner with the firm of Baker & McKenzie LLP. Our firm represents Defendant Virgin Mobile Pty, Ltd. in the above-captioned suit. This Declaration is submitted in support of Defendant Virgin Mobile Pty, Ltd.'s Final Reply to Plaintiffs' Sur-Reply to Defendant's Motion to Dismiss.

2. I am over the age of twenty-one (21) and am competent to make this Declaration. I have personal knowledge of the facts stated herein.

3. Attached to Defendant's Appendix is a true and correct copy of excerpts from the deposition of David Cain that was taken on April 23, 2008. APP 2-10.

I declare under penalty of perjury that the foregoing is true and correct.

Date: August 28, 2008

Myall S. Hawkins

HOUDMS/235729.1

COPY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISON

SUSAN CHANG, as Next Friend)
of Alison Chang, a minor, And)
Justin Ho-Wee Wong)
)
Plaintiffs) Cause No. 3:07-CV-01767
)
v.)
)
Virgin Mobile Pty Ltd)
)
Defendant)
)
)

Pursuant to Rule 30(b)(6),
Federal Rules of Civil Procedure

VIDEOTAPED VIDEOCONFERENCE
DEPOSITION OF DAVID CAIN

Taken at: Baker & McKenzie
Level 27, AMP Centre
50 Bridge Street
Sydney, NSW, 2000
Australia

On: Wednesday, April 23, 2008 at 10.28am

Reporter: Judith White, JP 184396

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Videographer:
Mr Wayne Matthews
National Court Reporters, Inc

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THE VIDEOGRAPHER: This is videotape number 1 in the deposition of David Cain in the matter of Susan Chang, as Next Friend of Alison Chang, a minor, And Justin Ho-Wee Wong v Virgin Mobile Pty Limited in the United States District Court, Northern District of Texas, Dallas Division. The case number is cause no. 3:07-CV-01767. Today's date is the 23rd of April 2008 and the time on the video monitor is 10.28am.

The videographer today is Wayne Matthews from National Court Reporters of Cleveland, Ohio, and this video deposition is taking place at level 27, 50 Bridge Street, Sydney, Australia.

Would counsel please identify yourselves and state whom you represent.

MR FITTS: My name is Bryant Fitts from the law firm of Fitts & Zehl. I'm here for the plaintiffs.

MR ZEHL: My name is Ryan Zehl and I am also with Fitts Zehl. I represent the plaintiffs.

MR HAWKINS: Myall Hawkins from Baker & McKenzie representing the defendant.

THE VIDEOGRAPHER: In Sydney.

MR STEWART: Andrew Stewart, Baker & McKenzie for the defendant.

MR BOURGET: Marcus Bourget. Corporate counsel Virgin Mobile Australia.

THE VIDEOGRAPHER: The court reporter today is Judith White from the firm of National Court Reporters of Cleveland, Ohio. Would the Justice of the Peace, Judith White, please swear in the witness.

DAVID CAIN,

having been duly affirmed, testified as follows:

THE VIDEOGRAPHER: Proceed, gentlemen.

BY MR ZEHL:

Q. Okay. Mr Cain, my name is Ryan Zehl and, as I stated earlier, I represent the plaintiffs in this case. Do you understand - Mr Cain, do you understand why we're here today, that we're involved in a lawsuit against Virgin Mobile?

A. Yes, I do.

Q. Okay. Mr Cain, have you ever been in a deposition before?

A. No, I haven't.

Q. Okay. I - I'm going to just give you a couple of general rules, just to make this easier. As you'll notice, there is some delay between my questions - well, there's a delay after my questions. If you wouldn't mind just waiting a couple of seconds before you answer so that there's no communication problems.

A. Yes, okay.

Q. Okay. And if you don't understand something

Q. Okay. So a little over two months?
A. Yep.
Q. Mr Cain, do you - are you paid by Virgin Mobile?
A. Yes.
Q. Do you have any employment contract with Virgin Mobile?
A. Yes, I believe so.
Q. Do you - when - when you are paid by Virgin Mobile, do you receive a cheque or is the money just deposited in your account electronically?
A. Bank deposit monthly.
Q. And do you know who deposits those funds in your account, which company?
A. Virgin Mobile.
Q. Okay. Who's the - do you know who the president is or CEO of Virgin Mobile?
A. Yes.
Q. Who is that?
A. His name is Matt Davey.
Q. And is he the CEO or the president or both?
A. CEO.
Q. Okay. Do you know who any of the directors or officers of the company are?
A. Yes.
Q. Can you identify those officers or directors that you are aware of, please?
A. The sales director's name is Geoff Hester, the marketing director's name is John Bradshaw, the customer service director's name is Rob Tihanyi, the finance director's name is Barbara - and her last name escapes me at this second - at this second, and there's an operations director, I think his name is Keir. I don't know his last name at this time either - Preedy.
Q. Okay. Thanks, Mr Cain. Do you report to the marketing director?
A. Yes.
Q. Would - would it be fair to say that the marketing director is your boss?
A. Yes.
Q. And over - over your five or so years at the company in the role that you're currently in, you said you have been responsible for about six or eight advertising campaigns; that's right? Correct?
A. Yes.
Q. Who is responsible for designing the campaigns?
A. Our advertising vendors.
Q. Okay. Your advertising vendors?
A. Mmm-hmm.
Q. Who - and who are your advertising vendors?

A. Primarily Host.
Q. Anyone else?
A. Not of any consequence, no.
Q. Not of any consequence. Have you worked with any other advertising vendors besides Host?
A. Yes.
Q. Can you identify those for me?
A. There's a company called Faster Louder which helped us advertise a music event last year.
Q. Okay. Is that the only other one?
A. There's another company called Modular, and they also advertised that - helped us advertise that same music event the year before.
Q. What about with your TV and radio campaigns? Which vendors do you work with in conjunction with those types of campaigns?
A. Host is in charge of all of our television campaigns.
Q. Have they been in charge of your television campaigns since you joined the company --
A. Yes.
Q. -- or - or began acting as the brand director?
A. Yes.
Q. Okay. Do you know approximately how long Virgin Mobile has worked - worked with Host?

A. Yes. Since launch.
Q. Since launch of what?
A. Sorry, the launch of --
Q. The company?
A. Yes, seven years. Over seven years.
Q. Okay. Okay. How does Virgin Mobile compensate Host? Do they compensate Host for their advertising services?
A. Yes.
Q. And do they do - do they do so by hour or by project or per year?
A. It's a combination of by hour and by project.
Q. Okay. I'm going to ask you some questions now about the "Are you with us or what?" campaign. Are you familiar with that campaign?
A. Yes.
Q. Were you responsible for that campaign?
MR HAWKINS: Object. Form.
THE WITNESS: Yeah, what do you mean by "responsible"?
BY MR ZEHL:
Q. Who - who at Virgin Mobile was responsible for that campaign?
MR HAWKINS: Same objection.
THE WITNESS: Again, there's - a lot of people are

responsible for the campaign.
BY MR ZEHL:
Q. Okay. Who at Virgin Mobile came up with the idea for the campaign?
A. No-one at Virgin Mobile came up with the idea.
Q. Okay. Who at Virgin Mobile decided to promote Virgin Mobile products in conjunction with the campaign?
A. The brand department.
Q. And are you in the brand department?
A. Yes.
Q. Are you the head of the brand department?
A. At this present time, yes.
Q. At the time of the campaign, were you the head of the brand department?
A. No, I wasn't.
Q. Okay. Who was the head of the brand department at that time?
A. Richard Field.
Q. Where is Richard Field now?
A. He lives in South Africa.
Q. Does he no longer work for Virgin Mobile?
A. No, he doesn't work for Virgin Mobile.
Q. Were you working in the brand department during the "Are you with us or what?" campaign?
A. Yes, I was.

Q. What was your role at that time?
A. To oversee the execution of advertising campaigns.
Q. Okay. Can you tell me why the former director of the brand department has left?
A. I don't know.
Q. Do you know when he left?
A. Yes.
Q. When was that?
A. December 28 last year.
Q. Of 2007?
A. Yes, that's correct.
Q. Okay. Were there any campaigns between the "Are you with us or what?" campaign and the time that the former director left the company?
A. Yes.
Q. Which campaigns were those?
A. The Virgin Broadband launch.
Q. Okay. Is that the only one?
A. Yes. There were - yes.
Q. Okay. Can you explain to me what your involvement was with the "Are you with us or what?" campaign?
A. My involvement was to work with outside - our outside advertising vendor, Host, in order to get an

advertising campaign to market.
Q. To market what?
A. To market free text Virgin to Virgin.
Q. Okay. So who approached Host about promoting free text messages?
A. Myself and Rich Field had a meeting with Host.
Q. Okay. And can you tell me, based on your observations and presence at that meeting, what was discussed during the meeting?
A. We told them that we had a new product which was we were offering free text to all Virgin Mobile customers when they text - send a text message to another Virgin Mobile customer. So we asked them to come up with an advertising campaign to sell that product.
Q. Okay. Can you - I'm sorry, I didn't write it down. What was the name of the former director again?
A. He - his title was brand general manager, I think you're referring to. His name was Richard Field.
Q. Okay. Thank you. And during this meeting, what instructions did you give to Host to help them assist Virgin Mobile with this campaign?
A. We asked to come - for them to come up with a range of concepts, advertising concepts, which would help people understand that if they were with Virgin Mobile that they could send another text message - send a text message to another Virgin Mobile customer for free.
Q. Okay. Did you instruct - did you give them any specific guidelines on what kind of concepts to come up with or what slogans to use, what kind of images to use?
A. No. The only - the only instruction - the only instruction was that it had to be within the "Are you with us or what?" guidelines.
Q. Okay. And what were the "Are you with us or what?" guidelines?
A. All it is is that it has to pose an opinion and then make it obvious which - of which part of that - of - of where - of where Virgin Mobile stood on that opinion.
Q. Okay. And it would be people that were projecting this opinion; is that right?
A. That wasn't in the brief, no.
Q. So animals could express opinions?
A. I can't - I don't - can't answer that. I - I don't know.
Q. So is it - was it not implicit to your marketing campaign that a person project the opinion?
MR HAWKINS: Object. Form.
THE WITNESS: It wasn't explicit.
BY MR ZEHL:
Q. Implicit?
A. It wasn't implicit.

A. Me personally?
Q. I'll rephrase. Have you personally ever used Flickr before this lawsuit?
A. No.
Q. Do you - was it your idea to use Flickr to obtain the images?
A. No.
Q. Do you know if it was at - anyone at Virgin Mobile's idea to use Flickr?
A. It wasn't.
Q. Whose idea was it to obtain the pictures from Flickr, do you know?
A. It was part of the - the - the concept, so it was Host's idea.
Q. But didn't you earlier tell me that you presented the general ideas of what you wanted in these campaigns and that they involved pictures of people with opinions - is that right or is that wrong?
MR HAWKINS: I object. Form. Mischaracterises his testimony and argumentative.
THE WITNESS: I didn't say that.
BY MR ZEHL:
Q. Okay. So from the beginning of the - from your first meeting with Host to the launch of the campaign, it's correct to say that concepts were presented to you and you ultimately chose one that used images obtained from Flickr; is that correct?
A. Yes.
Q. Okay. At that time, you had no knowledge that the pictures were being used pursuant to a Creative Commons licence; is that correct?
A. That's correct.
MR HAWKINS: Object. Form.
BY MR ZEHL:
Q. Do you know who downloaded the pictures of the people that were used in the "Are you with us or what?" campaign?
A. I - I know that there were - I know from a - I know - I don't know who - exactly who downloaded each picture, no.
Q. Do you know if the pictures were downloaded by somebody at Virgin Mobile or some - somebody somewhere else?
A. The pictures were downloaded by a company called The Glue Society.
Q. Okay. What is your - what is Virgin Mobile's relationship with The Glue Society?
A. We have no relationship.
Q. Then how did Virgin Mobile end up using pictures that were downloaded by The Glue Society in the

"Are you with us or what?" campaign; do you know?
A. Host had contracted The Glue Society.
Q. Okay. In Mr Bourget's affidavit in support of Virgin Mobile's motion to dismiss he states that Virgin selected the image of Alison Chang from hundreds of millions of available photographs from Flickr; is that correct or incorrect?
A. We didn't select the pictures from Flickr.
Q. So his affidavit is incorrect?
A. I don't think it's --
MR HAWKINS: Object. Form.
THE WITNESS: It's not a hundred per cent clear.
BY MR ZEHL:
Q. Excuse me? What did - can you repeat - you're not 100 per cent clear; is that correct?
A. Marcus's description isn't a hundred per cent clear of exactly what happened.
Q. So is he not qualified to provide his opinions on where the pictures were selected and obtained?
A. I don't know what qualification you need.
Q. Well, for somebody's statement - why - why is the statement not clear, can you tell me?
A. We didn't - we didn't select the pictures from Flickr. We - all we - we chose from a range of advertising - print advertisements that were presented to us.
Q. Do you know how many Flickr images were presented to you in the first concept?
A. All-up, 40. Roughly 40.
Q. And were all 40 of those images used in the campaign?
A. No.
Q. So you selected from the Flickr images that were presented to you; is that correct?
MR HAWKINS: Object. Form. Mischaracterising the evidence.
MR ZEHL: No, that's exactly what he said.
MR HAWKINS: No, again, the image - it's all one page. The images are on one page. There's no separate image.
BY MR ZEHL:
Q. Okay. Can you describe to me how the Flickr images were presented to you?
A. As a series of advertisements with a slogan and a picture and a logo.
Q. Okay. Were all those pictures on one page, the 40 images that you said were presented to you, or were they on separate pages? Can you tell me how they were presented to you?
A. Each advertisement was presented on an A3 piece